
CAUSE NO. 2009-CA-01188

IN THE SUPREME COURT OF MISSISSIPPI

REBUILD AMERICA, INC.

Appellant

v.

ROBERT McGEE, MATTIE McGee, ET. AL.

Appellee

BRIEF OF APPELLEE

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IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2009-CA-01188

REBUILD AMERICA, INC.

APPELLANT

V.

NO. 2009-CA-00422

ROBERT McGEE, MATTIE McGEE, ET. AL.

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. Merchants & Farmers Bank, Appellee
2. Jeffrey D. Rawlings, Attorney for Appellee
3. Jon J. Mims, Attorney for Appellee
4. Rawlings & MacInnis, P.A., Attorneys for Appellee
5. Robert McGee
6. Mattie McGee
7. Rebuild America, Inc. Appellant
8. Kimberley P. Turner, Esq., Attorney for Appellant
9. E. Barry Bridgforth, Esq., Attorney for Appellant
10. Henry, Barbour, Decell & Bridgforth, LTD., Attorneys for Appellant

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STATEMENT OF THE ISSUES

- I. THE CHANCERY COURT CORRECTLY RULED THAT THE TAX SALE SHOULD BE SET ASIDE SINCE ALL PARTIES AGREE THAT NO RETURN OF THE SHERIFF'S NOTICE WAS MADE.
- II. SANCTIONS AGAINST REBUILD AMERICA ARE APPROPRIATE FOR FILING A FRIVOLOUS APPEAL.

STATEMENT OF THE FACTS

There is no dispute that sheriff's returns were not made for the subject tax sales. This is supported by Affidavits submitted by Robert McGee, Mattie McGee (the "McGees" or "landowners"), and the Hinds County Chancery Clerk. (R. 000114, 000115, 000117, 000119). The McGees state that "no one ever hand delivered or personally served any notification of the alleged tax sales at issue". (R. 000117, 000119). The Deputy Chancery Clerk of Hinds County, Mississippi states that "[n]o return for either Sheriff's Notice was received by the Hinds County Chancery Clerk from the Holmes County Sheriff's Department." (R. 000114, 000115). Therefore, Rebuild America incorrectly asserts at Page 5 of its Appellant's brief that "[i]t is unknown to whether a return was provided to the Hinds County Chancery Clerk." According to the Deputy Chancery Clerk of Hinds County, no sheriff's returns were provided.

Rebuild America states that Affidavits were prepared by the Hinds County Chancery Clerk memorializing efforts to ascertain an alternate residence address after the Chancery Clerk's failure to perfect personal service upon the McGees. The Court should take notice that all of the form Affidavits are dated September 19, 2007 as reflected by the file stamp date. (R. 000203, 000204, 000211, 000212). The form Affidavits were prepared about three weeks after the respective parcels would have matured. In fact, the unsworn Affidavits were dated after the tax deeds were issued on September 10, 2007 (R. 000233, 000237).

On March 31, 2009, this Court rendered a decision affirming a lower court's order setting aside a tax sale for substantially similar reasons that are now again before this Court on Rebuild America's appeal. *Rebuild America, Inc. v. Milner*, 7 So.3d 972, 976 (Miss. Ct. App. 2009). In the *Milner* case, there were no sheriff's returns and only one of the record owners signed for mailed notice. In the instant appeal, Rebuild America again sits before this Court having no sheriff's returns to support a valid tax sale. In addition, the record in the instant case supports that Mattie Magee never signed for mailed notices. (R. 000117)

Tax sale notices to Bank were not delivered to an officer or agent of Bank authorized by law to receive process; therefore, the Bank argues as additional grounds that alleged lienholder notice was defective.

The McGees, having answered as pro se Defendants in this matter, should have been afforded notice of the instant appeal by Rebuild America. Rebuild America failed to provide written notice of the appeal to the McGees. For all these reasons and the arguments set forth below, the instant appeal should be dismissed as frivolous.

ARGUMENT

Standard of Review

The standard of review is the same as that standard recently stated by the Court in *Rebuild America, Inc. v. Milner*, 7 So.3d 972 (Miss. Ct. App. 2009). In matters that are questions of law, this Court employs a *de novo* standard of review and will only reverse for an erroneous interpretation or application of the law." *Id.* citing, *Morgan v. West*, 812 So. 2d 987, 990 (Miss. 2002). When "an appeal concerns property sold in a tax sale, this Court has held: 'Statutes dealing with land forfeitures for delinquent taxes should be strictly construed in favor of the landowners. *Brown v. Riley*, 580 So. 2d 1234, 1237 (Miss. 1991). Any deviation from the

statutorily mandated procedure renders the sale void.’ *Roach v. Goebel*, 856 So.2d 711, 716 (Miss. Ct. App. 2003) (citing *Hart v. Catoe*, 390 So. 2d 1001, 1003 (Miss. 1980)).” Id.

I. THE CHANCERY COURT CORRECTLY RULED THAT THE TAX SALE SHOULD BE SET ASIDE SINCE ALL PARTIES AGREE THAT NO RETURN OF THE SHERIFF’S NOTICE WAS MADE.

The Chancery Court simply followed the statutory requirements and well-established case law precedent in setting aside the tax sale where the Hinds County Chancery Clerk had no record of sheriff’s returns. Miss. Code Ann. §27-43-3 (Rev. 2004) requires that three different forms of notice be sent to a landowner informing the landowner of the opportunity to redeem his property when the property has been sold for delinquent ad valorem taxes: 1) MRCP Rule 4 personal service by summons must be had on each landowner, 2) service by certified mail to each landowner within 180 days of but no less than 60 days prior to, and 3) publication in the newspaper. All must be successfully accomplished for notice of the redemption period. *Viking Investments v. Addison Body Shop*, 931 So.2d 679 (Miss. Ct. App. 2006). In addition, Miss. Code Ann. 27-43-3 requires that in the event notice by mail is returned undelivered and the personal notice is returned not found, the clerk shall make further search and inquiry. Service shall be attempted again and the clerk shall make an affidavit specifying therein the acts of search and inquiry made by him in an effort to ascertain the address and post office. *Moore v. Marathon Asset Mgt. LLC*, 973 So. 2d 1017 (2008). Pursuant to the tax sale statutes, “the sale shall be void” “[s]hould the clerk inadvertently fail to send notice as prescribed”. See, Miss. Code § 27-43-3. Due to the clerk’s and sheriff’s failure to provide personal notice, the Chancery Court correctly determined that the tax sale is void. Tax sale notice requirements are strictly construed in favor of voiding the tax sale. See, *Gober v. Chase Manhattan Bank*, 918 So. 2d

840, (Miss. Ct. App. 2005). There is no record of sheriff's notice and no record of certified mail delivered to landowner Mattie McGee on the tax sales.

The Chancery Clerk's Affidavits of record do not provide substantive evidence that an additional search and inquiry was conducted as required by Miss. Code Ann. § 27-43-3. The affidavit is merely a printed form checklist. It does not adequately show that an additional diligent search and inquiry was conducted. Because the form Affidavits were generated and filed after maturity, they served no meaningful purpose. If the Affidavits prepared by the Chancery Clerk served the purpose intended by statute, they should have been prepared before the maturity date with sufficient time for the clerk to discover no returns were made and to make a meaningful inquiry as to the status of the returns. The tax sale statute at issue clearly provides that the sheriff is required to personally serve as other summons are served under Rule 4 of the Mississippi Rules of Civil Procedure. See Viking Investments v. Addison Body Shop, 931 So.2d 679, 682 (Miss. Ct. App. 2006). This mandatory notice requirement was not afforded to the McGees. Rebuild America apparently argues that mere mailing of the sheriff's notice to the sheriff's department for service by the Chancery Clerk is sufficient. It does not follow that sufficient due process requirements can be met simply by issuance and mailing to the sheriff's office. The argument is frivolous. The statute clearly provides that notice is "required to be served by the sheriff". Miss. Code Ann. § 27-43-3. Rebuild America complete disregards the sheriff's notice requirement. For all of these reasons, the Chancery Court's Opinion and Order of the Court entered June 23, 2009 and the Final Judgment must be affirmed.

II. SANCTIONS AGAINST REBUILD AMERICA ARE APPROPRIATE FOR FILING A FRIVOLOUS APPEAL.

Merchants & Farmers Bank requests that this Court find that Rebuild America's appeal is frivolous and warrants an award of sanctions under Mississippi Rule of Appellate Procedure 38.

The question for determining whether sanctions are appropriate as set forth in *Harris v. Harris*, 988 So. 2d 376, 380 (Miss. 2008) is "whether a reasonable person would have any hope for success. Given that Rebuild America, less than a year ago, lost an appeal on a unanimous decision based on substantially similar grounds, it would stand to reason that Rebuild America should reasonably have believed it would have no hope of success in the instant appeal. *Rebuild America, Inc. v. Milner*, 7 So.3d 972, 976 (Miss. Ct. App. 2009). For those reasons, Merchants & Farmers Bank request that sanctions be awarded for its reasonable attorney's fees. Merchants & Farmers would respectfully submit that \$2,500.00 is a reasonable attorney's fee in this matter for the fees and costs incurred by Merchants and Farmer's Bank in defending this appeal.

CONCLUSION

Merchants & Farmers Bank respectfully requests that this Court affirm the Order and Final Judgment Setting Aside and Voiding Tax Sales of the Chancery Court and find that sanctions in the form of a reasonable attorney's fee in the amount of \$2,500.00 awarded to Merchants and Farmers Bank as against Rebuild America, Inc. is appropriate under the circumstances for all of which let execution issue.



This the 22nd day of January, 2010.

Respectfully submitted,

MERCHANTS AND FARMERS BANK

By: 

Its Attorney

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CERTIFICATE OF SERVICE

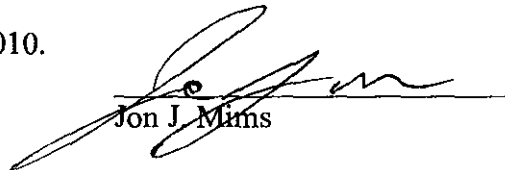
I do hereby certify that I have this date mailed a true and correct copy of the above and foregoing *Brief of Appellee* to the following:

Kimberley P. Turner
E. Barry Bridgforth
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Hon. William H. Singletary
Hinds County Chancery Judge
Post Office Box 686
Jackson, MS 39205

Betty W. Sephton
Clerk of the Supreme Court of Mississippi
P.O. Box 249
Jackson, MS 39205-0249

This the 22nd day of January, 2010.


Jon J. Mims